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No. 04-944

Supreme Court, U.S.
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In The Supreme Court of the United States

JENIFER ARBAUGH,

Petitioner,

v.

Y & H CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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I. THE QUESTION PRESENTED BY THIS CASE WAS NOT DECIDED, OR EVEN PRESENTED IN *WALTERS V. METROPOLITAN EDUCATIONAL ENTERPRISES, INC.*, 519 U.S. 202 (1997)

The Question Presented in the instant case was neither decided nor presented in *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202 (1997). The question actually presented and decided in *Walters* was as follows:

> Whether an hourly paid employee who has an ongoing employment relationship with a person, as reflected by the employee's inclusion on the person's payroll, is counted as an employee of that person for purposes of Section 2000e(b) on days when the employee is not at work or on paid leave.[1]

Nothing in *Walters* purported even to consider whether the answer to this question went to the merits of the plaintiff's claims, or instead limited the jurisdiction of the court.

The lower courts in *Walters* had treated the employee numerosity requirement as jurisdictional.[2] In the procedural posture of *Walters* itself, however, whether or not the requirement is jurisdictional was irrelevant. Thus the decision in *Walters*, unsurprisingly and indeed quite properly, said nothing about whether the employee numerosity requirement in that case was jurisdictional.

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[1] *Equal Employment Opportunity Commission v. Metropolitan Educational Enterprises, Inc.*, Nos. 95-770 and 95-259, Brief for the Equal Employment Opportunity Commission, p. i.

[2] The Seventh Circuit, in which *Walters* arose, has since disavowed that position. See *infra*.

Because this Court in *Walters* was conspicuously silent on this issue, Respondent infers that the Court, indeed *every* member of the Court, must have (tacitly) agreed that such a requirement is jurisdictional.

> Surely, if any of the justices on this Court had believed that the district and appellate courts had erred in addressing the employee numerosity requirement as a matter of subject jurisdiction, those justices would have so stated in either the Court's opinion or in concurring opinions.

(Br. Opp. 2).

This argument is profoundly inconsistent with the manner in which this Court reviews and decides cases. The very purpose of the certiorari procedure, and of the requirement that a petition state the question or questions presented, is to carefully delineate what issue the Court is undertaking to resolve. Once review has been granted, the Court will only decide issues fairly encompassed within that question presented. It emphatically is not the practice of this Court, or of its members, to include in opinions casual criticism of portions of decisions in the lower courts which were neither raised by the question presented nor briefed by the parties. The failure of the Court to include such remarks in any particular case reflects the considerable care with which the Court selects and decides issue, and is not the result of some *ad hoc* tacit approval process.

That is all the more so where, as here, the question never mentioned in an opinion of the Court concerns the jurisdiction of the federal courts. In *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998), this Court emphasized the inappropriateness of "drive-by jurisdictional rulings." 523 U.S. at 91. If drive-by jurisdictional rulings are

inappropriate, surely *tacit* drive-by jurisdictional rulings are simply inconceivable.

Respondent suggests that the employee numerosity dispute in *Walters* would have been remanded for resolution by a jury if the Court had not tacitly concluded that the employee numerosity requirement is jurisdictional, and thus a matter for resolution by the court. (Br. Opp. at 2-3). But the parties in *Walters* had entered into extensive factual stipulations; the facts stipulated to by the employer were sufficient to meet the payroll approach adopted by the Court. Under those circumstances, there simply were no controverted factual issues to be remanded for resolution by any trier of fact.

II. THE COURTS OF APPEALS ARE SHARPLY DIVIDED REGARDING THE QUESTION PRESENTED

We noted in the petition that the opinion of the court below conflicts with decisions in the Second, Third, Fifth, Eleventh, and District of Columbia Circuits. (Pet. 9-14). Respondent does not deny that Second and Third Circuits have clearly rejected the holding of the court below that employee numerosity requirements are jurisdictional.

The District of Columbia Circuit held that such requirements are not jurisdictional in *EEOC v. St. Francis Xavier Parochial School*, 117 F.3d 621 (D.C.Cir. 1997). Respondent asserts that the holding of *St. Francis Xavier* "is undermined by [Judge Sentelle's] concurrence in that very case." (Br. Opp. 5). But Judge Sentelle's concurring opinion was merely that, a concurrence. The two other members of the panel joined in the majority opinion holding, contrary to the decision in the instant case (and

contrary to the minority view expressed by Judge Sentelle), that employee numerosity requirements are not jurisdictional. That majority opinion constitutes the law of the circuit in the District of Columbia Circuit. Judge Sentelle did not suggest otherwise; to the contrary, Judge Sentelle expressly acknowledged that the holding of the majority had since 1995 been the controlling law of the circuit in the District of Columbia Circuit.[3]

The Seventh Circuit has reiterated in five decisions since 1995 that employee numerosity requirements are not jurisdictional. *Johnson v. Apna Ghar, Inc.*, 330 F.3d 999, 1001-02 (7th Cir. 2003); *Komorowski v. Townline Mini-Mart and Restaurant*, 162 F.3d 962, 964 (7th Cir. 1998); *Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676, 677 (7th Cir. 1998); *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 943 (7th Cir. 1999); *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435, 438 n. 1 (7th Cir. 1996). Respondent suggests that the Seventh Circuit merely presents an unresolved intra-circuit disagreement, and that the Seventh circuit has never disavowed an earlier decision in *Rogers v. Sugar Tree Products, Inc.*, 7 F.3d 577 (7th Cir. 1994). "Neither the panel in *Komorowski* nor the panel in *Ost*, however, indicated they were overruling *Rogers*." (Br. Opp. 4). To the contrary, the 1998 panel in *Komorowski*

[3] "I agree with the majority that *Haddon v. Walters*, 319 U.S.App.D.C. 63, 43 F.3d 1488 (D.C.Cir. 1995), impels us to treat this as a Rule 12(b)(6) question rather than a jurisdictional one." 117 F.3d at 626.

explained at length why and how the Seventh Circuit had disavowed the earlier 1994 decision in *Rogers*.[4]

The Eleventh Circuit has twice held that employee numerosity requirements are not jurisdictional. *Morrison v. Amway Corp.*, 323 F.3d 920 (11th Cir. 2003); *Garcia v. Copenhaver, Bell & Associates*, 104 F.3d 1256 (11th Cir. 1997). Respondent suggests that the Eleventh Circuit presents no more than an intra-circuit conflict, noting that between *Morrison* and *Garcia* there was an intervening decision with dicta to the contrary in *Scarfo v. Ginsberg*, 175 F.3d 957 (11th Cir. 1999). (Br. Opp. 5). The Eleventh Circuit has authoritatively resolved this problem. The Eleventh Circuit's most recent decision in *Morrison* emphatically disavowed *Scarfo*, explaining that *Scarfo* had erred in failing to follow the earlier binding precedent in *Garcia*.

> Having reviewed *Garcia* and *Scarfo*, we are compelled to the same conclusion as Judge Barkett: *Garcia* was "squarely applicable" to the facts of *Scarfo*. [175 F.3d at 961] (Barkett, J., dissenting.)

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[4] 162 F.3d at 964:

> We recently *clarified* that a district court does not lack subject matter jurisdiction in cases where the defendant fails to meet the statutory definition of "employer." . . . *Ost v. West Suburban Travelers Limousine, Inc.*. . . . In *Ost* this court noted that *prior* circuit case law had characterized the issue of a defendant's status as an "employer" as a matter of subject matter jurisdiction. . . . *See, e.g., Rogers v. Sugar Tree Prods., Inc.*. . . . The *Ost* court *nonetheless* concluded that *E.E.O.C. v. Chicago Club*, 86 F.3d 1423 (7th Cir. 1996), "*makes clear* that a plaintiff's failure to establish that a defendant is an 'employer' does not divest the federal courts of the power to hear the plaintiff's case." 88 F.3d at 438 n. 1.

(Emphasis added).

> By concluding otherwise, *Scarfo* effectively overruled *Garcia sub silentio*. . . .
>
> A prior panel decision of this Court is binding on subsequent panels and can be overturned only by the Court sitting en banc. . . . *Garcia* preceded *Scarfo* and, in our view, correctly states the law in our circuit. As a panel of this Court ourselves, it is not for us to decide whether *Garcia should* be the law in this Circuit. . . . Rather, we conclude *Garcia is* the law in this Circuit and must be respected.

323 F.3d at 929. In the Eleventh Circuit today there is absolutely no question that *Morrison* and *Garcia*, not *Scarfo*, are the law of the circuit.

Respondent errs in suggesting that disputes about employee numerosity requirements can be "avoided by simple pre-litigation investigation." (Br. Opp. 11). To the contrary, litigation about employee numerosity usually involves complex factual and legal issues. In the instant case, for example, substantial discovery was needed to create a record involving considerable documentary and sworn evidence; the decisions below turned on confidential issues – such as whether the wives who worked at the restaurant were supervised by their husbands, or had taxes deducted from their paychecks (Pet. App. 18-20) – that could hardly have been brought to light by "simple pre-trial investigation." The record in *Walters* included some 52 charts summarizing the employer's records.[5]

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[5] *EEOC v. Metropolitan Educational Enterprises, Inc.*, Nos. 95-779 and 95-250, Brief for the Equal Employment Opportunity Commission, p. 5.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit

Respectfully submitted,

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